

**Ma Boon Lan v UOB Kay Hian Pte Ltd (previously known as
Kay Hian Pte Ltd) and another appeal**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
Q-02(IM)-2017 OF 2011 AND Q-02(IM)-2018 OF 2011
AZAHAR MOHAMED, BALIA YUSOF WAHI AND LIM YEE LAN
JJCA
20 MAY 2013

*Civil Procedure — Appeal — Striking out — Service — Whether writ and/or
notice of writ served out of jurisdiction — Whether service irregular and defective
— Whether in compliance with s 387 of the Singapore Companies Act — Rules of
the High Court 1980 O 12 rr 6, 7 & O 18 r 19*

There were two appeals. In the first appeal, the appellant was Ma Boon Lan ('the plaintiff') and the respondent was UOB Kay Hian Private Ltd ('the defendant'). In the second appeal, the appellant was UOB Kay Hian Pte Limited and the respondent was Ma Boon Lan. Both appeals arose from the decision of the learned judicial commissioner ('JC') regarding the defendant's summons in chambers ('encl 23') where the defendant had applied to strike out the plaintiff's writ and/or the notice of writ and the service out of jurisdiction under O 12 rr 6 and 7 and O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). In dismissing encl 23, the learned JC held that the plaintiff's purported service out of jurisdiction of the notice and/or the writ of summons on the defendant in Singapore was irregular and/or not in accordance with the law. Aggrieved by the decision, the plaintiff then appealed to this court ('the first appeal') against part of the decision where the learned JC ordered that the service of the writ of summons ('encl 3') and the notice of writ of summons to be served out of jurisdiction ('encl 13') on the defendant in Singapore be set aside. The defendant was also aggrieved by that decision in that the learned JC had dismissed their encl 23 with each party to bear its own costs. Hence, the second appeal.

Held, allowing the plaintiff's appeal; dismissing the defendant's appeal with costs:

- (1) The words 'may' and 'shall' occurred in O 11 r 5(8) of the RHC. The two words were used in contradistinction to each other. Since the words occurred in the same provision, they should be given their natural meaning. For this reason, the word 'may' where it appeared in O 11 r 5(8) of the RHC must be taken in its natural sense, that was, permissive sense and not mandatory or obligatory sense. There was no valid reason for giving 'may' a mandatory meaning. In the context of the present case, it

- A merely gave the plaintiff an option to serve should he so desire, the notice of writ of summons to be served out of jurisdiction and the writ of summons (see para 11).
- B (2) The defendant never made any denial in any of their affidavits that the said notice and writ of summons together with the statement of claim had been duly served on them. It was for these reasons that the court came to the conclusion that the service of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim at the defendant's office in Singapore through the plaintiff's agent in Singapore was made in compliance with O 11 r 5(3), O 11 r 2(2) and s 387 of the Singapore Companies Act. Therefore, the learned JC had erred in law and in fact in deciding that the service out of jurisdiction on the defendant in Singapore was defective (see para 13).
- C
- D (3) Enclosure 23 was wholly unsustainable. The High Court might exercise jurisdiction over a non-resident defendant by virtue of s 23(1)(a) of the Courts of Judicature Act 1964 which provided that subject to the limitations contained in art 128 of the Federal Constitution, the High Court would have jurisdiction to try all civil proceedings where the cause of action arose. In the premise, the defendant's appeal was dismissed (see para 15).
- E

[Bahasa Malaysia summary]

- F Terdapat dua rayuan. Dalam rayuan pertama, perayu adalah Ma Boon Lan ('plaintif') dan responden adalah UOB Kay Hian Private Ltd ('defendan'). Dalam rayuan kedua, perayu adalah UOB Kay Hian Pte Ltd dan responden adalah Ma Boon Lan. Kedua-dua rayuan berbangkit daripada keputusan pesuruhjaya kehakiman yang bijaksana ('PK') mengenai saman dalam kamar defendan ('lampiran 23') di mana defendan telah memohon untuk membatalkan writ saman plaintif dan/atau notis writ dan penyampaian di luar bidang kuasa di bawah A 12 k 6 dan 7 dan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam menolak lampiran 23, PK yang bijaksana memutuskan bahawa penyampaian di luar bidang kuasa notis dan/atau writ saman oleh plaintif terhadap defendan di Singapura adalah di luar aturan dan/atau tidak mengikut undang-undang. Terkilan dengan keputusan, plaintif kemudian membuat rayuan kepada mahkamah ini ('rayuan pertama') terhadap sebahagian daripada keputusan di mana PK yang bijaksana memerintah bahawa penyampaian writ saman ('lampiran 3') dan notis writ saman yang harus disampaikan di luar bidang kuasa ('lampiran 13') terhadap defendan di Singapura diketepikan. Defendan juga terkilan dengan keputusan tersebut di mana PK yang bijaksana telah menolak lampiran 23 mereka dengan setiap pihak menanggung kos masing-masing. Justeru, rayuan kedua ini.
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Diputuskan, membenarkan rayuan plaintiff; menolak rayuan defendan dengan kos: A

- (1) Perkataan 'may' dan 'shall' wujud di dalam A 11 k 5 KMT. Kedua-dua perkataan digunakan dalam perbandingan antara satu sama lain. Memandangkan perkataan-perkataan ini wujud di dalam peruntukan yang sama, ia seharusnya diberikan maksud semulajadi. Untuk sebab ini, perkataan 'may' di mana ianya dinyatakan di dalam A 11 k 5(8) KMT hendaklah diambil dari segi semulajadi, iaitu, dalam bentuk permisif dan bukan dalam bentuk mandatori atau bentuk kewajipan. Tiada sebab yang berpatutan untuk memberikan 'may' maksud mandatori. Dalam konteks kes ini, ia sekadar memberikan plaintiff pilihan untuk menyampaikan, sekiranya dikehendaki olehnya, notis writ saman yang seharusnya disampaikan di luar bidang kuasa dan writ saman (lihat perenggan 11). B C
- (2) Defendan tidak pernah membuat sebarang penafian di dalam mana-mana affidavit mereka bahawa notis tersebut bersama penyataan tuntutan telah disampaikan terhadap mereka. Oleh kerana sebab-sebab ini mahkamah membuat kesimpulan bahawa penyampaian notis writ saman yang hendaklah disampaikan di luar bidang kuasa dan writ saman bersama penyataan tuntutan writ saman di pejabat defendan di Singapura melalui ejen plaintiff di Singapura adalah menurut A 11 k 5(3), A 11 k 6(2) dan s 387 Akta Syarikat Singapura. Justeru, PK yang bijaksana telah terkhilaf dalam undang-undang dalam memutuskan bahawa penyampaian di luar bidang kuasa terhadap defendan di Singapura adalah defektif (lihat perenggan 13). D E F
- (3) Lampiran 23 secara keseluruhan tidak dapat dipertahankan. Mahkamah Tinggi hendaklah melaksanakan bidang kuasa terhadap defendan yang bukan residen menurut s 23(1)(a) Akta Mahkamah Kehakiman 1964 yang mana memperuntukkan bahawa tertakluk kepada had-had yang terkandung di dalam perkara 128 Perlembagaan Persekutuan, Mahkamah Tinggi seharusnya mempunyai bidang kuasa untuk membicarakan kesemua prosiding sivil di mana kausa tindakan berbangkit. Dalam premis ini, rayuan defendan ditolak (lihat perenggan 15).] G H

Notes

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1727–1740. I

Cases referred to

Danaharta Managers Sdn v Tsang & Ong Stockbrokers (Pte) Ltd [2005] 2 MLJ 664, HC (folld)

A Legislation referred to

Companies Act [SG] s 387
Courts of Judicature Act 1964 s 23(1)(a)
Federal Constitution art 128
Rules of the High Court 1980 O 6 r 6(1), O 11 rr 2(2), 4, 5(3), 5(8), O 12 rr 6,
7, O 18 r 19

Appeal from: Suit No 22–20 of 2010 (MR) (High Court, Miri)

Louis Achuk (Kadir, Wong, Lin & Co Advocates) for the plaintiff.
Tai Choi Yu (Tai Choi Yu & Co Advocates) for the defendant.

C

Azahar Mohamed JCA (delivering judgment of the court):

D [1] There are two appeals before us. First, Civil Appeal No Q-02(IM)-2017 of 2011 ('the first appeal'). In the first appeal, the appellant is Ma Boon Lan (the plaintiff in the High Court) and the respondent is UOB Kay Hian Pte Ltd (the defendant in the High Court). And secondly, Civil Appeal No Q-02(IM)-2018 of 2011 ('the second appeal'). In the second appeal, the
E appellant is UOB Kay Hian Pte Ltd and the respondent is Ma Boon Lan. We heard both the appeals together and after hearing oral arguments, we reserved judgment. We now give our judgment.

F [2] For convenience, we will refer to the parties in this judgment to the title assigned to them in the court below.

G [3] Both these appeals arise from the decision of the learned judicial commissioner ('JC') given in the High Court at Miri on 16 June 2011 in relation to the defendant's summons in chambers dated 22 November 2010 (encl 23).

H [4] By encl 23, the defendant had applied to strike out under O 12 rr 6–7 and O 18 r 19 of the Rules of the High Court 1980 ('the RHC') the plaintiff's writ and/or the notice of writ and the service out of jurisdiction thereof. In respect of encl 23, the learned JC held that the plaintiff's purported service out of jurisdiction of the notice and/or the writ of summons on the defendant in Singapore was irregular and/or not in accordance with the law. The learned JC further ordered that the defendant's application in encl 23 be dismissed and each party to bear its own costs.

I

[5] Aggrieved by that decision, the plaintiff then appealed to this court (the first appeal) against part of the decision whereby the learned JC ordered that the service of the writ of summons (encl 3) and the notice of writ of summons to be served out of jurisdiction (encl 13) on the defendant in Singapore be set

aside. The defendant is also aggrieved by that decision in that the learned JC had dismissed their encl 23 with each party to bear its own costs; hence the second appeal.

[6] We think it is useful to state briefly the factual background and the sequence of events leading to the present appeals. In a previous action, on 8 August 2003 the defendant had obtained judgment against the plaintiff for a sum of S\$21,993.41 with interest and costs. The defendant had initiated several execution proceedings against the plaintiff arising from this judgment. The defendant filed a bankruptcy notice vide Bankruptcy Proceedings No 29–333 of 2008. The plaintiff then applied to strike out the bankruptcy notice. Pending the hearing of the plaintiff's application to strike out the bankruptcy notice, on 16 January 2009, the defendant as the creditor in Bankruptcy Proceedings No 29–333 of 2008 filed the creditor's petition against the plaintiff. On 14 April 2009, the senior assistant registrar ('the SAR') had allowed the plaintiff's application to strike out the bankruptcy notice. After that, the defendant had filed an appeal to the judge in chambers against the decision of the SAR in striking out the said bankruptcy notice. Even though the bankruptcy notice had been struck out and despite the defendant's appeal to judge was still pending, the defendant had on 6 July 2009 proceeded to serve the creditor's petition by substituted service vide two publications in the 'Borneo Post' and the 'United Daily News' respectively.

[7] The plaintiff complained that the publications were wrongful and had libeled him. So therefore, the plaintiff filed this suit herein against the defendant for general and aggravated damages. However, the defendant's place of business and registered address was in Singapore. In that case, the plaintiff had applied for and obtained the leave of the court to issue the writ out of jurisdiction and also to serve the writ out of jurisdiction in Singapore. Then, the defendant filed encl 23, which is the subject matter of the appeals herein.

THE FIRST APPEAL

[8] With regard to the first appeal, it is important to note that the true sealed copies of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim were personally served on the defendant in Singapore by one Mohd Yunus bin Aim, a process server of Hilborne & Co Advocates and Solicitors, of Singapore. In his affidavit of service, the process server affirmed as follows:

- 1 That I did on the 3rd day Of December 2010 at 10.23 am personally served the abovenamed Defendant at 8 Anthony Road #01 Singapore 229957 with the true sealed copies of the Notice of Writ Summons To Be Served Out of Jurisdiction dated the 22nd day of September, 2010 and the Writ of Summons dated the 17th day of June, 2010 together with the

A Statement of Claim thereof dated the 16th day of June, 2010 which appeared to me to have been regularly issued out of the High Court at Miri Sarawak against the abovenamed Defendant at the suit of the abovenamed Plaintiff. A copy each of the Proof Copy of Notice of Writ of Summons To Be Served Out of Jurisdiction dated the 22nd day of September, 2010 and

B the Writ of Summons dated the 17th day of June, 2010 are annexed hereto.

2 That when I reached the aforesaid address of the Defendant, I met with a lady whose name was Ann who admitted to me that she is a staff of the Defendant and is authorized to receive documents. The said person had

C signed and placed the official rubber stamp of the Plaintiff on the Proof Copies of the said Notice of Writ of Summons To Be Served Out of Jurisdiction dated the 22nd day of September, 2010 and the Writ of Summons dated the 17th day of June, 2010 to confirm the receipt of the said documents and she had accepted the Service Copies of the said Notice of Writ of Summons To Be Served Out of Jurisdiction dated the 22nd day

D of September, 2010 and the Writ of Summons dated the 17th day of June, 2010 on behalf of the Defendant.

[9] In his judgment, the learned JC held that the plaintiff's purported service out of jurisdiction is irregular and defective. In particular, the relevant passage from the judgment of the learned JC states:

O 11 r 5(8) provides that where the defendant is in Singapore or Brunei, the notice of a writ may be sent by post or otherwise by the registrar to the magistrate, registrar, or other appropriate officer of any court exercising civil jurisdiction in the area in

F which the person to be served is said to be or to be carrying on business for service and with an affidavit of service, it shall be deemed to have been duly served. It means the notice of the writ is to be sent by the DR or SAR in Miri to the magistrate or registrar in Singapore for service upon the defendant in this case. From the affidavit of service, this was not complied with. The notice and the writ were served by Mohd Yunus bin Aim, a process server of Hilborne & Co Advocates and Solicitors, of

G Singapore. The service of the writ out of jurisdiction being not in compliance with the RHC was defective and should be set aside.

[10] With respect, we are unable to agree with the views of the learned JC on this issue. Order 11 r 5(8) of the RHC states:

Where the defendant is in Singapore or Brunei, the notice of a writ *may* be sent by post or otherwise by the Registrar to the Magistrate, Registrar, or other appropriate officer of any Court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying on business for service on the defendant, and if

I it is returned with an indorsement of service and with an affidavit of such service, it *shall* be deemed to have been duly served. (Emphasis added.)

[11] It is to be noted that the words 'may' and 'shall' occur in the same

provision. The two words are used in contradistinction to each other. Since the words occur in the same provision, they should be given their natural meaning. For this reason, in our judgment the word 'may' where it appears in O 11 r 5(8) of the RHC must be taken in its natural sense, that is, permissive sense and not mandatory or obligatory sense. There is no valid reason for giving 'may' a mandatory meaning as argued by learned counsel for the defendant. In our view, in the context of the present case, it merely gives the plaintiff an option to serve should he so desire, the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim to the defendant in the mode as stated in the provision.

[12] This then brings into focus the following question: whether the plaintiff had complied with the RHC in effecting service out of jurisdiction on the defendant. In the first place, it is not disputed that the plaintiff had obtained the necessary leave from the court on 17 June 2010 for the issuance of a writ notice to be served out of the jurisdiction on the defendant pursuant to O 6 r 6(1) of the RHC. Next, on 27 August 2010 the plaintiff obtained leave from the court an order for service out of jurisdiction pursuant to O 11 r 4. Now, the provision relating to the service of a notice of writ outside jurisdiction is O 11 r 5(3) of the RHC which provides that a notice of writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected. The other relevant provision is O 11 r 6(2) of the RHC 1980 which reads:

Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served:

- (a) through the judicial authorities of that country; or
- (b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of the country:
 - (i) through a Malaysian Consular authority in that country; or
 - (ii) by the plaintiff or his agent.

[13] Learned counsel for the plaintiff brought to our attention the provision of s 387 of the Singapore Companies Act which provides that a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company. As we have mentioned earlier, the plaintiff had filed an affidavit of service of one Mohd Yunus bin Aim, a process server of Hilborne & Co Advocates and Solicitors, where it was averred that true sealed copies of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim were served on the

A defendant by leaving a copy of the same at the defendant's registered address in Singapore. It is important to note that the defendant never made any denial in any of their affidavits that the said notice and writ of summons together with the statement of claim had been duly served on them. It is for these reasons that we come to the conclusion that the service of the notice of writ of summons to

B be served out of jurisdiction and the writ of summons together with the statement of claim writ of summons at the defendant's registered office in Singapore on 3 December 2010 through the plaintiff's agent in Singapore was made in compliance with O 11 r 5(3), O 11 r 6(2) and s 387 of the Singapore Companies Act. In the case of *Danaharta Managers Sdn v Tsang & Ong Stockbrokers (Pte) Ltd* [2005] 2 MLJ 664, the plaintiff had issued a writ notice

C (encl 5) to be served out of jurisdiction on the defendant. The defendant's place of business and registered address was in Singapore. The plaintiff then filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng ('Chew'), a process server in Singapore. Chew averred that encl 5 was served by

D leaving a copy of the same at the defendant's registered address. The defendant applied to set aside encl 5 on the ground that the service of encl 5 on them was defective under the laws of Singapore. The defendant claimed they were served by a Malay man and not Chew, as maintained by the plaintiff. As there was no due and proper service of encl 5 in accordance with O 11 of the RHC, the

E defendant maintained that the judicial power of the court should not and could not be invoked in Singapore. The SAR dismissed their application to set aside the service of encl 5. The defendant appealed. In dismissing the defendant's appeal, Vincent J (as he then was) said, and we respectfully agree with him, as follows:

F It is noteworthy that the defendant did not deny that encl 5 was served on them ('left at the registered office' in the words of their own counsel) at their registered address at No 80 Robinson Road #02-00 Singapore. The notice of writ being so served, I would hold that as the plaintiff had complied with s 387 of Singapore Companies

G Act and the plaintiff had in turn also complied with the stipulation in our O 11 r 5(3) that such notice has to be served 'in accordance with the law of the country in which service is effected'.

[14] Hence, in our view, the learned JC has erred in law and in fact in

H deciding that the service out of jurisdiction on the defendant in Singapore was defective. Accordingly, we allowed the plaintiff's appeal with costs of RM10,000 in his favour. The deposit is to be refunded to the plaintiff.

THE SECOND APPEAL

I [15] We turn next to the defendant's appeal. As we have said earlier, this is an appeal by the defendant against the decision of the learned JC in dismissing the defendant's application in encl 23 with each party to bear its own costs. It is pertinent to note that the grounds of the application are that (a) the court has

no jurisdiction to hear or to entertain the writ; (b) that the plaintiff has no cause of action against the defendant arising within the local jurisdiction of the court; (c) that the defendant resides outside the local jurisdiction of the court; (d) it is an abuse of the process of the court; and (e) that it is scandalous, frivolous and vexatious. In our view, encl 23 is wholly unsustainable. The Miri High Court may exercise jurisdiction over a non-resident defendant by virtue of s 23(1)(a) of the Courts of Judicature Act 1964 which provides that subject to the limitations contained in art 128 of the Federal Constitution, the High Court shall have jurisdiction to try all civil proceedings where the cause of action arose. In the statement of claim, the plaintiff has pleaded that the publications of the libel in the *Borneo Post* and *United Daily News*, were alleged to have occurred within the High Court's jurisdiction. As stated by the learned JC in his judgment, at this point in time, the court is not concerned as to the truths of the allegations made in the statement of claim. Indeed, the questions whether there were in fact any publications, whether the publications were defamatory of the plaintiff or otherwise, whether the publications were privileged and so on are issues to be determined at the trial. In the premise, we dismissed the defendant's appeal with costs of RM10,000 in favour of the plaintiff. The deposit to the plaintiff to account of fixed costs.

Plaintiff's appeal allowed; defendant's appeal dismissed with costs.

Reported by Afiq Mohamad Noor

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